In The

Supreme Court of the United States

Docket No. 78-1595

GEORGE CALVIN LEWIS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

Page

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This is the petition of George Calvin Lewis, Jr., for a Writ of Certiorari to a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Court's opinion has not yet been published in the Federal Reporter, Second Series. It will, however, be reported. The case number in the Court below is No. 78-5073.

JURISDICTION

The jurisdiction of this Court is invoked by reason of the following:

(A) The case was decided on January 24, 1979; and judgment was entered that date.

(B) A petition for rehearing and motion for stay of mandate were timely filed. On March 19, 1979, the petition for rehearing was denied, and the Court stayed the issuance of mandate for 30 days from March 19, 1979, to permit filing of a petition for writ of certiorari.

(C) Jurisdiction to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254.

QUESTION

The question presented is whether a conviction in violation of *Gideon* v. *Wainwright,* 372 U.S. 335, may be used to support a subsequent conviction under Title 18 U.S.C. App. § 1202(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, or regulations involved are:

(A) The Constitution of the United States of America, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(B) Title 18 U.S.C. App. § 1202(a)(1): "Any person who—(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony

* * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000, or imprisoned for not more than two years, or both."

STATEMENT OF THE CASE

George C. Lewis was tried in the United States District Court for the Eastern District of Virginia on December 22, 1977. He was charged with possessing a firearm having been previously convicted of a felony.

On the day of the non-jury trial, counsel for Lewis, in a request for a continuance, brought to the District Court's attention that the underlying conviction was a 1961 conviction of breaking and entering with intent to commit a misdemeanor, which was a felony under Florida law. Counsel represented to the Court that he had discovered a few days earlier that Lewis had not had an attorney at this 1961 trial. Counsel stated that at his request an attorney in Florida had investigated the records of the Court where Lewis was tried. These records, counsel told the District Court, showed affirmatively that Lewis did not have a lawyer. Counsel also made a proffer of evidence of indigency.

The District Court ruled that the invalidity of the conviction was immaterial. Accordingly, no proof of the Gideon violation was presented. The Appellate Court affirmed, with one judge dissenting.

ARGUMENT

There is a division among the circuits on whether convictions that are constitutionally invalid may underlie convictions under Title 18 U.S.C. App. § 1202(a)(1) and related statutes.

For example, the Ninth Circuit (*Pasterchik* v. *United States,* 466 F.2d 1367) and the Seventh Circuit (*United*

States v. *Lufman,* 457 F.2d 165) have held collateral attack permissible.

But a sharply divided Third Circuit (*United States* v. *Graves,* 554 F.2d 65), the Tenth Circuit (*Barker* v. *United States,* 579 F.2d 1219), the Eighth Circuit (*United States* v. *Edwards,* 568 F.2d 68), and the Fourth Circuit (the instant case and *United States* v. *Allen,* 556 F.2d 724) have held otherwise.

Additionally, the Sixth Circuit has decided a case, *United States* v. *Maggard,* 573 F.2d 926, which held that a conviction attacked collaterally for *ineffective* assistance of counsel could form the basis for a firearms conviction, but said in dictum that it did not believe the same result would hold in a case in which proof of the conviction showed facial invalidity.

Lastly, the Fifth Circuit has held that in prosecutions under 18 U.S.C. § 922(a)(6), that is, falsification of one's status, the underlying conviction may not be attacked. *United States* v. *Ransom,* 545 F.2d 481, cert. den. 434 U.S. 909, Mr. Justice White dissenting. But the Fifth Circuit has reached a different result in possession cases. *Dameron* v. *United States,* 488 F.2d 724.

Lewis alleged in the District Court that his underlying conviction (which, incidentally, came out of the same state, Florida, and about the same time, as Gideon's) was a pure violation of *Gideon* v. *Wainwright,* 372 U.S. 335. He alleged he was unrepresented. His attorney represented that production of the court records would show this fact. He also made a proffer of indigency. It should be pointed out that the government's proof of the prior conviction consisted of Lewis's Florida prison record, not his court records.

We believe the position taken by the Court of Appeals for the Fourth Circuit is unique. No other circuit has held that convictions based on violations of *Gideon* can form the basis

for convictions under the firearms statutes. See Judge Winter's dissent at page 21 of the appended decision. We respectfully submit this holding marks a retreat from *Gideon,* and from *Burgett* v. *Texas,* 389 U.S. 109, *United States* v. *Tucker,* 404 U.S. 443, and *Loper* v. *Beto,* 405 U.S. 473.

CONCLUSION

We respectfully request that the Writ of Certiorari be granted.

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CERTIFICATE

I certify that three copies of this Petition with the opinion appended, were mailed to N. George Metcalf, Assistant United States Attorney, U.S. Court House, 10th and Main Sts., Richmond, Va. 23219, and the same number of copies to Solicitor General, Department of Justice, Washington, D. C. 20530, prior to filing in the Clerk's Office of this Court.

ANDREW W. WOOD

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Argued: October 6, 1978 Decided: January 24, 1979

RUSSELL, CIRCUIT JUDGE:

This appeal presents for decision whether a defendant, charged as a convicted felon with the possession of a firearm in violation of § 1202(a)(1), 18 U.S.C. App., may defend by claiming for the first time that his felony conviction was constitutionally invalid. The facts giving rise to this question in this case are not in dispute. The defendant does not deny on this appeal the receipt and possession of a firearm. Neither does he dispute his earlier conviction in Florida or that such conviction is facially valid. It is further conceded that prior to his receipt and possession of the firearm and prior to his trial in this case, he had not collaterally attacked in any post-conviction proceeding this extant conviction. He does claim as his sole defense, though, that his felony conviction was invalid because he was denied the assistance

of counsel, and he sought to offer evidence in support of such claim. The district court refused to admit any such evidence and held that, in a prosecution under § 1202(a)(1), the defendant may not defend by seeking at trial to impeach on constitutional grounds his earlier felony conviction. After conviction, he appealed, contending that this ruling, denying him the right to attack collaterally his earlier felony conviction in his § 1202(a)(1) prosecution was in error. We perceive no error in the ruling and affirm the conviction.

The Gun Control Act, an integral part of the Omnibus Crime Control and Safe Streets Act of 1968,[1] was intended to bar certain classes of persons from possessing or receiving firearms and to limit possession of firearms to "persons who are responsible and law-abiding."[2] The right of Congress, in the interest of public safety, to enact such legislation and to establish the classifications of persons who might not possess firearms has never been questioned. *United States* v. *Samson* (1st Cir. 1976) 533 F.2d 721, 722, *cert. denied* 429 U.S. 845. Congress has identified in that Act as a class not permitted to possess or receive firearms "[a]ny person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." § 1202(a)(1). What Congress intended by this section, as the legislative history as well as the statutory language itself

[1] The Omnibus Crime Control and Safe Streets Act of 1968 consists of two Titles relating to the possession of firearms. § 922 is a part of Title IV and § 1202 is a part of Title VII. Title IV was the original firearm section but Title VII was added during Senate consideration of the Act and was intended, according to its author, to complement Title IV. There is of course considerable overlap of the two Titles but each was seeking to deal with the same evil under similar prohibitory procedures. For a discussion of the legislative history of the two Titles, *see United States* v. *Bass* (1971) 404 U.S. 336, 341-346 and *Hyland* v. *Fukuda* (9th Cir. 1978) 580 F.2d 977, 979, note 3.

[2] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226.

makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had "not been invalidated as of the time the firearm is possessed," is subject to the statutory prohibition stated in § 1202(a)(1), and this is true though his "status as a convicted felon changed after the date of possession, *Regardless of how that change of status occurred.*" (Italics added) This was the construction given the statute by Judge Hufstedler in the earliest case to consider the application of 1202(a)(1). *United States* v. *Liles* (9th Cir. 1970) 432 F.2d 18, 20.[3]

In *Liles,* the defendant's conviction under 1202(a)(1) was affirmed "notwithstanding the fact that the prior conviction, which was an essential element of the firearms conviction, was reversed one day before he was convicted of the firearms offense. It was there held that Liles' possession of the revolver was unlawful for *one of his* status at the time he possessed it. It was not made lawful by the subsequent reversal of his prior felony conviction."[4] The rule in *Liles*

[3] In *McHenry* v. *People of State of California* (9th Cir. 1971) 447 F.2d 470 at 471-472, an entirely different panel of this Circuit sought, over a strong dissent to restrict *Liles* to the situation where "the prior felony conviction was reversed because of insufficient evidence" and not where it was reversed for some constitutional defect. 447 F.2d at 471. For reasons later stated herein, it appears to us that one whose conviction is invalidated for want of evidence stands in a stronger position than one whose conviction is reversed and remanded for another trial because of a constitutional defect. We agree with the comment of the dissenting judge in *McHenry,* who wrote (477 F.2d at 472):

> "After oral argument, we invited supplemental briefs and a discussion of *Liles*. The parties have been unable to distinguish it from the case before us, nor can I."

[4] (Italics in opinion) This summarization of the ruling in *Liles* is taken from *Barker, supra* (579 F.2d at 1226).

Liles was followed in *United States* v. *Williams* (8th Cir. 1973) 484 F.2d 428, 430, even though the conviction in that case had been dismissed.

would seem to be applicable, whatever the basis on which the felony conviction may subsequently have been reversed or invalidated. This would include subsequent invalidation for constitutional error in the conviction.

We apprehend no legal difference between a subsequent reversal for a denial of a constitutional right and one based on some other error; both are equally invalid. It must be conceded, however, that the equities are more in favor of the defendant whose felony conviction is subsequently reversed on appeal for insufficiency of evidence than one whose conviction is reversed for failure to afford counsel to the defendant.[5] In the former case, the defendant is acquitted and found never to have been guilty; in the latter, the conviction is merely reversed and the defendant is subject to retrial and possible conviction anew. Unquestionably, the defendant in the latter case, who has not been found guilty, should have no greater right than the defendant in the former case, who was adjudged not guilty. That is, though, precisely the position of the appellant.

This position of the appellant is contrary to the manifest legislative purpose of § 1202(a)(1) and related legislation, as we declared it in *United States* v. *Allen* (4th Cir. 1977) 556 F.2d 720. In that case, we said that by its firearms legislation "Congress intended to restrict the disposition of firearms to those with *standing* felony convictions *even though the convictions may later be found constitutionally invalid.*"[6] This construction of the legislation as stated in *Allen* was also expressed by the Court in *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 69, a case cited with approval in *Allen*. In that case, the Court said:

[5] *See, United States* v. *Williams, supra* (484 F.2d at 430).

[6] (Italics added.) 556 F.2d at 722.

> "These materials (*i.e.*, '(a) the language of the statutes, (b) the legislative history, and (c) the opinions of other courts which have endeavored to interpret the statutes') suggest that the legislative draftsmen desired persons with extant, though arguably unconstitutional, convictions to forbear from the purchase and possession of firearms until their convictions are voided by the courts or until they are freed from such disability by executive action. Failure to so refrain was intended to subject such persons to the penalties specified in the Act."

Assuredly Congress never intended that prosecutions under this legislation should be encumbered with collateral issues attacking the validity of a facially valid conviction, either because, as in *Williams,* the conviction had subsequently been reversed on account of insufficiency of evidence, or, as here, because of a constitutional claim of denial of counsel. So much we declared in *Allen,* where we said that "[t]he scheme [of prosecution under the legislation] adopted by Congress avoids the time-consuming collateral issues."[7] This view as set forth in *Allen* was recently upheld in *United States* v. *Maggard* (6th Cir. 1978) 573 F.2d 926. In that case, the Court said that "the legislative history of § 1202 indicates that Congress intended to make the proof of the fact of a prior felony conviction the sole predicate for the prohibition against possession of a weapon" and neither "Congress [nor] the Supreme Court has required or suggested that a court to which a § 1202 indictment is assigned

[7] 556 F.2d at 723.

Allen, it is true, involved a false statement prosecution under § 922(a)(6) and not a status prosecution such as here but the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed. *See, United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 144.

for trial must routinely retry the constitutional validity of the predicate offense."[8]

The appellant argues that, irrespective of legislative purpose, a conviction under § 1202(a)(1), which includes as an essential element a felony conviction, cannot stand if it can be shown in the 1202 prosecution that the defendant's constitutional right to counsel was denied at his felony conviction. This, he asserts, is the command of *Burgett* v. *Texas* (1967) 389 U.S. 109, which, in his view, makes the felony conviction "void from the outset" and not usable "for any purpose." This argument, if sustained, would mean that the Government, at any time a defendant chooses to raise the issue, would be obligated to prove in a firearms prosecution that the underlying felony conviction was free of constitutional error. *Allen* refused to read *Burgett* "so broadly" or to find, as the defendant would argue, "that a conviction in violation of *Gideon* is absolutely meaningless" in this context.[9] We declared there that Congress had a right to prohibit a person subject to an extant felony conviction, "even though * * * obtained in violation of *Gideon*," from possessing a firearm. We said:

> "Although *Burgett, Tucker* and *Loper* established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel for

[8] 573 F.2d at 928 and 929.
[9] 556 F.2d at 723.

> those under investigation. * * * (citing cases) Nor does the absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*."

Graves sounded the same warning and reached the same conclusion (554 F.2d at 83):

> "As a final point, we recognize that to extend *Burgett* to prosecutions under the Gun Control Act might well create a new method of collateral attack, *i.e.*, a re-evaluation of the constitutionality of prior criminal proceedings within a trial of a weapons offense. To obtain a firearms conviction, under the approach pressed by Graves, the government would have to demonstrate the constitutional validity of outstanding convictions—at whenever a defendant so insists. Yet, there is no evidence that Congress intended this type of procedure—a 'trial-within-a-trial'—when it enacted the firearms legislation. Nor is there anything in *Burgett* or its descendants to indicate that the Supreme Court commanded such an arrangement. Consequently, this Court should not sanction a program which appears to be at variance with the intent of Congress and goes a substantial step beyond the teachings of *Burgett*."

We recognize that there are cases which take a contrary view to that expressed by us.[9] We do not find them persuasive nor do they answer the thoughtful opinion of Chief Judge Haynsworth in *Allen*, and the substantial number of cases which have taken a like view with him.[10] We accordingly conclude that Congress had the constitutional power, in the promotion of public safety to prohibit under criminal penalties any person subject to an outstanding facially valid felony conviction, which, though arguably constitutionally invalid, had not been earlier invalidated, from possessing and receiving firearms and that it did so by § 1202(a)(1).

The conviction of the defendant is accordingly

AFFIRMED.

[9] *United States* v. *Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424, *Dameron* v. *United States* (5th Cir. 1974) 488 F.2d 724, 727, *United States* v. *Lufman* (7th Cir. 1972) 457 F.2d 165, 167, *United States* v. *DuShane* (2d Cir. 1970) 435 F.2d 187, 190, and *United States* v. *Mason* (D. Md. 1975) 68 F.R.D. 619, 625.

[10] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226, *United States* v. *Maggard*, (6th Cir. 1978) 573 F.2d 926, 928-929, *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 80-81, and *United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 141.

The Eighth Circuit has reserved judgment on status type cases. *United States* v. *Edwards* (8th Cir. 1977) 568 F.2d 68, 72.

WINTER, CIRCUIT JUDGE, dissenting:

The majority decides that one prosecuted for an alleged violation of 18 U.S.C. App. § 1202(a)(1)[1] cannot defend on the ground that the prior conviction for a felony rendering his receipt or possession of a firearm a violation of law was obtained in violation of the Sixth Amendment. Because I believe that § 1202(a) does not place on the defendant the burden of affirmatively seeking to vacate a conviction manifestly invalid because of the denial of counsel, I respectfully dissent.

I.

As this case comes to us, I do not understand, as the majority asserts, that defendant concedes the "facial" validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on its face. The district court declined to consider the record of the prior conviction, ruling it immaterial. In arguing the correctness of the district court's ruling, the government in effect concedes that for present purposes the conviction was obtained in violation of defendant's Sixth Amendment rights. For purposes of this appeal, we must treat that as a fact.

The majority's interpretation of § 1202(a) rests on the premise that Congress meant to punish the possession of a firearm by a person who has been convicted of a felony, even if that conviction was obtained in total disregard of his constitutional right to the assistance of counsel. I am reluctant to attribute to Congress such a cavalier attitude

[1] § 1202(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned . . . .

toward one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).[2] Moreover, I find insubstantial support for the conclusion.

Section 1202 was introduced as a last-minute amendment on the floor of the Senate. It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction.[3] Even the opinion in United States v. Graves, 554 F.2d 65 (3 Cir. 1977), upon which the majority heavily relies, admits that "the applicable legislative record is somewhat limited in scope and does not speak directly to the precise issues raised in this case," and that the legislative intent must be gleaned from "some clues" in the statutory history. *Id.* at 73.[4]

In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional.[5] *See, e.g.,* United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of § 1202 (a) runs afoul of that rule.

[2] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Graves, 554 F.2d 65, 82 n.68 (3 Cir. 1977) (quoting Schaefer, *Federalism and State Criminal Trials,* 70 Harv. L. Rev. 1, 8 1956)).

[3] "Title VII [which includes § 1202] was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report." United States v. Bass, 404 U.S. 336, 344 (1971). The amendment, introduced by Senator Long, received a favorable but cautious reaction on the Senate floor, but suggestions for further study and modification were preempted by an unexpected call for a vote. Title VII received similarly scant attention in the House. *See id.* at 344 n.11.

[4] The majority also seeks support for its statutory interpretation in United States v. Allen, 556 F.2d 720 (4th Cir. 1977), but that case dealt not with § 1202(a) but with 18 U.S.C. § 922, which prohibits the giving of a false statement in connection with the purchase of a firearm. Unlike § 922, § 1202(a) requires a *conviction* for a felony, not merely an indictment or a statement about prior criminal activity. Thus, the reasoning in *Allen* that mere probable cause to believe that a person has committed a felony, rather than a reliable conviction, is enough to restrict his ability to possess a firearm and to support a conviction is inapplicable to § 1202(a). While § 922 is a part of Title IV of the Ominbus Crime Control and Safe Streets Act, § 1202(a) is part of Title VII of that Act. In another context, the Supreme Court has cautioned us that these titles must not be assumed to "dovetail neatly." United States v. Bass, 404 U.S. 336, 344 (1971). *See also* United States v. Graves, 554 F.2d 65, 87 (3 Cir. 1977) (Garth, J., concurring in part and dissenting in part). Moreover, as I discuss below, the exact holding of *Allen* was that § 922(a)(6) penalized making false statements rather than being a felon. Broader and more general language in *Allen* is thus dictum.

[5] The opinion in United States v. Liles, 432 F.2d 18 (9 Cir. 1970), on which the majority heavily relies to support its statutory interpretation, gives no indication that it ever considered the implications of Burgett v. Texas, 389 U.S. 109 (1967). This omission is not surprising, since the prior conviction in *Liles* was asserted to be invalid on grounds of substantive state law, not considered in *Burgett*. Nor is it surprising that on four separate occasions, the Ninth Circuit, when faced with the problem of *Burgett,* has ruled that the constitutional invalidity of a prior felony conviction may be asserted as a defense to a charge of possession or transportation of a firearm by a felon. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Pasterchik v. United States, 466 F.2d 1367 (9th Cir. 1972) (per curiam); McHenry v. California, 447 F.2d 470 (9th Cir. 1971); United States v. Thoresen, 428 F.2d 654 (9 Cir. 1970).

II.

I had thought that, as a matter of constitutional law, Burgett v. Texas, 389 U.S. 109 (1967), prohibited the very thing that was done here. *Burgett* held that the record of a prior conviction which showed on its face that the conviction was obtained in violation of the right to counsel was inadmissible in a prosecution under a Texas recidivist statute. "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* [372 U.S. 335 (1963)] to be used against a

person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 115.[6] Here, defendant's receipt and possession of a firearm was illegal solely because he had been previously convicted of a felony. A necessary element of the crime was proof that he had been convicted of a felony and the government's only proof was that of a conviction which had been obtained without counsel. The conclusion is inescapable that the prior offense supported the determination of guilt for the instant offense in violation of *Burgett*.

Our decision in United States v. Allen, 556 F.2d 720 (4 Cir. 1977), does not lead to a contrary conclusion. *Allen* concerned a prosecution under 18 U.S.C. § 922(a)(6) which prohibits the making of a false statement in connection with the acquisition of a firearm. Allen had signed the prescribed form for obtaining a firearm stating that he had never been convicted of a felony. The statement was false, but Allen sought to show that the prior conviction was obtained in violation of his right to counsel. We held the validity of the prior conviction immaterial, distinguishing *Burgett* on the ground that under § 922(a)(6), unlike the Texas recidivist statute, the penalty is not for the prior conviction but rather for the untruthful statement concerning it.

III.

I do not read the majority opinion to deny the applicability of *Burgett* to § 1202(a) prosecutions; it is implicit from what it says that if Lewis had been successful in post-conviction attack on his earlier conviction, he could not have been convicted under § 1202(a). Rather, its holding is that

[6] The Supreme Court has extended the rule of the inadmissibility of prior uncounseled convictions to sentencing, United States v. Tucker, 404 U.S. 443 (1972), and to impeachment of a defendant who has testified, Loper v. Beto, 405 U.S. 473 (1972).

even an invalid, uncounseled felony conviction is sufficient to bring an accused within the § 1202(a) prohibition on firearms possession, unless the defendant has successfully taken affirmative action to overturn the invalid conviction. To my mind, *Burgett* may not be so limited.

In the first place, it is noteworthy that the Supreme Court has seen no need to impose this requirement. In *Burgett*, the prior uncounseled conviction of the defendant was held inadmissible, even though the defendant had never sought post-conviction relief to have his prior conviction overturned. Similarly, in Loper v. Beto, 405 U.S. 473 (1972), where the Supreme Court forbade the use of a prior uncounseled conviction for purposes of impeaching a defendant, the Court showed no concern over the fact that the defendant had not taken affirmative steps to have his prior conviction declared invalid. And in our own decision in Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968), we held that a state court unconstitutionally considered a prior uncounseled conviction in sentencing a defendant under a habitual offender statute, even though the prior conviction had not been collaterally attacked.

The majority notes the concern expressed in the *Graves* case that allowing a defendant in a § 1202(a) prosecution to raise for the first time the validity of his prior felony conviction would lead to a wasteful "trial-within-a-trial." In *Graves*, however, the defendant alleged that his prior felony conviction was invalid not because of a denial of counsel but rather because of failure to observe the complex due process requirements for transferring cases from juvenile courts, as announced in Kent v. United States, 383 U.S. 541 (1966). The *Graves* court noted the involved factfinding that would be necessary to determine the validity of the prior conviction and specifically contrasted this defense with the simple assertion that a prior con-

viction was invalid for a denial of counsel, as in *Burgett*. Thus, one of the grounds on which *Graves* explicitly distinguished *Burgett* was that "*Burgett* was bottomed on a manifest abrogation of the right to counsel—a constitutional guarantee not asserted here." 544 F.2d at 80.[7]

In contrast to the complex attack on the prior conviction attempted by the defendant in *Graves,* Lewis asserts that it clearly appears on the face of the record of his prior conviction that he was not afforded counsel. Lewis' assertion can be quickly and easily verified without the necessity of conducting an involved "trial-within-a-trial." Indeed, every court of appeals which has addressed the issue has held that a defendant charged with possession or transportation of a firearm by a felon may defend against the charge by asserting for the first time that the prior felony conviction was invalid for denial of the *right to counsel. See, e.g.,* United States v. Lufman, 457 F.2d 165, 168 n.3 (7 Cir. 1972); United States v. Thoresen, 428 F.2d 654, 663-64 (9 Cir. 1970) (decided under former 15 U.S.C. § 902(e)).[8]

[7] The other cases cited by the majority to support its position are likewise inapposite, since the defendants in those cases sought to attack the validity of their prior convictions on grounds other than denial of the right to counsel. *See* Barker v. United States, 579 F.2d 1219 (10 Cir. 1978) (improper jury instructions at prior conviction; further, defendant had waived this defense by pleading guilty to firearms charge); United States v. Maggard, 573 F.2d 926 (6 Cir. 1978) (incompetent performance of counsel at prior conviction); United States v. Bryant, 448 F.S. 139 (D. S.C. 1978) (prior conviction based on uninformed guilty plea).

[8] The government's brief urges that these cases were wrongly decided and directs us instead to two cases in each of which the accused, after he was convicted of a firearms offense and then successfully obtained a court order invalidating the prior felony conviction, was granted relief from the firearms conviction under 28 U.S.C. § 2255. Dameron v. United States, 488 F.2d 724 (5th Cir. 1974); Pasterchik v. United States, 466 F.2d 1367 (9 Cir. 1972) (per curiam). By arguing that these two cases permit affirmance of Lewis' § 1202(a) conviction, the government implicitly concedes that Lewis could at some future time collaterally attack his prior conviction and, if he was successful, could then obtain § 2255 relief from the instant conviction. Since the validity or invalidity of Lewis' prior conviction is apparent from the face of the record and will not require a mini-trial, I think that this argument exults procedure over substance. From the standpoint of judicial efficiency and economy, let alone the unfairness of subjecting Lewis to suffer the indignity of a federal firearms conviction when it is quite clear that he will be able to obtain subsequent § 2255 relief, I see no reason to require it. Certainly nothing in the *Dameron* or *Pasterchik* cases *requires* a defendant to go through this convoluted procedure.

See also United States v. DuShane, 435 F.2d 187 (2 Cir. 1970).

IV.

In short, neither reason nor authority supports a rule that one previously convicted of a felony in violation of his Sixth Amendment right cannot assert the invalidity of that conviction as a defense to a prosecution under § 1202 (a). Thus, I am persuaded that "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. at 115. I would therefore reverse the conviction and remand the case for a new trial with directions to receive the record of the prior offense in order to determine whether the prior conviction was obtained in violation of the Sixth Amendment. If it was, in my view defendant cannot be guilty of the crime charged.